

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW MEXICO**

RICHARD KIRBY,

Plaintiff,

v.

No. CIV 08-659 JCH/LFG

ROBERT EZELL, SHANNON  
McREYNOLDS, and MAJOR  
HORTON,

Defendants.

**ORDER DENYING AS MOOT PLAINTIFF'S APPLICATION FOR  
CERTIFICATE OF APPEALABILITY AND DENYING LEAVE  
TO PROCEED *IN FORMA PAUPERIS* ON APPEAL**

THIS MATTER comes before the Court on Plaintiff's Application for a Certificate of Appealability to the Court of Appeals for the Tenth Circuit [Doc. 72]. No response is necessary. For the reasons given below, the application is denied and the Court further determines that Plaintiff may not proceed on appeal *in forma pauperis*.

On November 4, 2009, the Court overruled Plaintiff Richard Kirby ("Kirby")'s objections and adopted the Magistrate Judge's recommendation that this action be dismissed. [Doc. 67]. Judgment was entered that same date in favor of Defendants. [Doc. 68]. Kirby asked for an extension of time to file his Notice of Appeal and certificate of appealability; he was granted an extension of time to file the Notice of Appeal. [Doc. 70]. Kirby's Notice of Appeal [Doc. 71] was thereafter filed on December 3, 2009, along with the instant Application for Certificate of Appealability. In his Application, Kirby argues the merits of his appeal and asks that the Court issue a certificate of appealability.


Pursuant to 28 U.S.C. § 2253, a certificate of appealability is required for appeals from a denial of a federal petition for habeas corpus brought under 28 U.S.C. § 2254 or § 2255. No such certificate is required for appeals from decisions in civil rights suit brought under 42 U.S.C. § 1983, such as the present action. Therefore, the request is denied as moot.

Kirby, an inmate proceeding *pro se*, was granted leave to proceed *in forma pauperis* in this action. [Doc. 3]. By asking for a certificate of appealability, it may be that Kirby wishes to continue his *in forma pauperis* status on appeal, in which case he must show a “reasoned, nonfrivolous argument on the law and facts in support of the issues raised on appeal.” Rolland v. Primesource Staffing, LLC, 497 F.3d 1077, 1079 (10<sup>th</sup> Cir. 2007). A party who was permitted to proceed *in forma pauperis* in the district court may continue in that status on appeal without further authorization, unless the district court certifies that the appeal is not taken in good faith, that is, when the litigant fails to raise the required argument in support of the issues raised on appeal. 28 U.S.C. § 1915(a)(3); Rolland, *supra*.

The Court finds that Kirby has failed to raise the requisite reasoned, nonfrivolous argument in support, and therefore his implied request for *in forma pauperis* status on appeal is denied.

IT IS THEREFORE ORDERED that Plaintiff’s Application for Certificate of Appealability [Doc. 72], is denied as moot.

IT IS FURTHER ORDERED that the Court certifies that Plaintiff’s appeal is not taken in good faith and therefore under 28 U.S.C. § 1915(a)(3), he is denied leave to proceed on appeal *in forma pauperis*.

  
UNITED STATES DISTRICT JUDGE